U.S. Department of Labor

Office of Administrative Law Judges
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In the Matter of	:	
	:	
DANIEL JOHNS	:	Dated: January 31, 2001
Claimant	:	
	:	Case No.: 1999-LHC-2174
v.	:	
		:
NATIONAL CONTAINER COMPANY	:	
Employer	:	
	:	
and	:	
	:	
ITT HARTFORD INSURANCE CO.,	:	
Carrier		:
	:	
and	:	
	:	
DIRECTOR, OFFICE OF WORKERS'	:	
COMPENSATION PROGRAMS	:	
Party-in-Interest	:	

Lori A. Carter, Esq.
Savannah, GA
For the Claimant

Timothy Jay Haeussler, Esq.
Savannah, GA
For the Respondent

Before: JEFFREY TURECK
Administrative Law Judge

DECISION AND ORDER

This is a claim for compensation for temporary total disability arising under the Longshore and Harbor Workers Compensation Act, 33 U.S.C. § 901, *et. seq.* (hereinafter "the Act"). A formal hearing was held in Savannah, Georgia on February 14, 2000. At the hearing the

parties submitted a lengthy list of stipulation, as follows: the Longshore & Harbor Workers' Compensation Act applies; an Employee and Employer relationship exists; Daniel Johns (hereinafter "Claimant") sustained a compensable work related injury on October 26, 1992; Claimant has not returned to work for National Container Company (hereinafter "Employer") following the initial period of disability, which began on June 30, 1993; Claimant's average weekly wage at the time of his injury was $800.00 per week, with a corresponding compensation rate of $533.36; Claimant was temporarily totally disabled from June 30, 1993 through March 22, 1995; Claimant was temporarily totally disabled from March 23, 1995 through February 2, 1996; Claimant was temporarily totally disabled from March 3, 1996 through January 27, 1998; Claimant was temporarily totally disabled from January 24, 2000 through January 31, 2000; Respondent paid permanent partial disability benefits to Claimant at the rate of $533.36 per week from February 14, 1998 through October 15, 1998; Employer paid an additional 10 weeks of permanent partial disability benefits based on a 27% impairment rating of Claimant's lower left extremity given by Dr. Steven Shapiro; Claimant worked for Beasley's Machine Shop from March 23, 1995 through February 2, 1996, earning $250 per week for a total of $11,000; Claimant again worked for Beasley's Machine Shop from January 21, 1999 through April 18, 1999 earning $300 per week; Claimant worked for Murray Motorsports from April 19, 1999 to the hearing date on a commission basis; Claimant underwent a trial spinal implant on January 24, 2000 which was removed on January 31, 2000; Employer has authorized the permanent spinal implant, which was scheduled for February 15, 2000, to be performed by The Neurological Institute of Savannah; Claimant will be on temporary total disability from the implant surgery until released to return to work by his physicians; the authorized treating physicians as of the hearing date were Drs. Steven Shapiro, Wayne Woodbury, and Arnold Tillinger; copies of the depositions of Drs. Shapiro and Woodbury can be used in lieu of the original depositions, which were submitted in the State Board of Workers' Compensation hearing held on October 27, 1999.

Claimant contends that he is entitled to compensation for temporary total disability from January 27, 1998 through January 24, 2000. On February 6, 1998, Employer converted Claimant's benefits from temporary total disability to permanent partial disability based on Dr. Shapiro's assignment of a 27% impairment rating to Claimant's left lower extremity. Claimant maintains that Dr. Shapiro's rating only reflected Claimant's recovery from his most recent surgery, and that he is still temporarily totally disabled. Employer argues that Claimant received a scheduled injury for which it has paid all benefits due.

FINDINGS OF FACT AND CONCLUSIONS OF LAW[1]

[1] Citations to the record of this proceeding will be abbreviated as follows: CX–Claimant's Exhibit; EX–Employer's and Insurer's Exhibit; JX–Joint Exhibit; TR–Hearing Transcript.

A. Background

Claimant is 47 years old and married with two children (CX 1-I, at 2). He worked for Employer as a longshore mechanic, "doing repairs on chassis and boxes that haul freight" (TR 17). On October 26, 1992, Claimant was straightening a rear header on a 40 foot container. The chain on a chain jack that Claimant was using broke, and the chain jack fell on Claimant's left foot. He was wearing steel-toed shoes at the time, which saved his toes from amputation (CX 1-B, at 2). Claimant sought medical treatment, and was initially given pain medication and treated conservatively (CX 1-A, at 1-3). He was released to work about a month after his injury (CX 1-A, at 1). Unfortunately, Claimant's pain progressed after his release to work. He complained that his three middle toes burned constantly, and he experienced some swelling in his toes (CX 1-B, at 2). He was treated by several doctors before being referred to Dr. Scott Corpe, who diagnosed Claimant with reflex sympathetic dystrophy ("RSD") of his left lower extremity in November 1993 (EX 1, at 6-7; CX 1-D, at 57). RSD is a degenerative disease that affects a specific population of nerves, in Claimant's case those going to his left leg (CX 1-L, at 1). RSD is commonly caused by a crush injury such as Claimant's, and Claimant exhibits the "cardinal features" of RSD, including severe pain in multiple areas of his left foot, mottled skin on his foot, and decreased temperature in his foot (EX 1, at 7, 11). It is common for patients with RSD to have so much pain that they cannot tolerate even light touching of the foot, and one of Claimant's physicians described RSD as a "hideous disease process" in which patients "often develop intractable pain" (CX 1-L, at 1; EX 1, at 7-8). Claimant testified that the RSD causes him constant pain and burning in his foot and pain in his leg (TR 18).

In addition to the pain in his left foot and leg, Claimant has pain in his right foot, knee, and back that he asserts is caused by the injury to his left foot (TR 19). Because of the pain in his left foot, he has put a disparate amount of weight on his right foot, and subsequently developed a weight bearing spur and a neuroma in that foot. He also has lower back pain that radiates into both legs, which his treating physician for his back believes has most likely developed from postural changes as a result of Claimant's left foot injury (CX 1-L, at 33-34; TR 50). At the hearing, Claimant mentioned pain in his knee for which he was scheduled to see a specialist (TR 19-20). In addition, Claimant has experienced depression and has been under a psychiatrist's treatment since 1994 (CX 1-D, at 24). He has found it difficult to cope with his inability to work and his ongoing problems in obtaining worker's compensation for lost wages and medical expenses (CX 1-K; TR 21). He has taken several medications for his depression (TR 21). At the time of the hearing, Claimant's treating physicians were: Steven Shapiro, an orthopedic surgeon specializing in the foot and ankle, for foot pain and RSD; Wayne Woodbury, a physical medicine and rehabilitation specialist, for back pain and RSD; and Dr. Tillenger, a psychiatrist, for depression (JX 1; EX 1, at 4; EX 2, at 5).

Since his injury, Claimant has undergone extensive treatment for his pain with marginal relief. He has had five surgeries on his left foot and two on his right foot (TR 19; EX 1, at 6-7, 17). He has had physical therapy and numerous spinal injections, trigger point injections, and sympathetic nerve blocks (TR 19; EX 1, at 11).

Claimant has received compensation under his state workers' compensation statute and under the Longshore and Harbor Workers Compensation Act. Under the Federal Act, Employer paid benefits for temporary total disability until February 6, 1998,[2] at which time it changed Claimant's classification to permanent partial disability (TR 40, 70). Employer had requested Dr. Shapiro to find that Claimant had reached maximum medical improvement ("MMI") and provide a disability rating. In late January, 1998 Dr. Shapiro responded that six months had passed since Claimant's most recent surgery, and Claimant was ready to be assigned an MMI rating (CX 1-J, at 21). Dr. Shapiro set the impairment rating at 27% of the left foot (CX 1-J, at 19-21). Noting that the Act provides no guidance regarding RSD specifically, Dr. Shapiro reached this figure by focusing on the specific damage to the nerves of the foot and muscle weakness from "wasting of the calf" (CX 1-J, at 19). Employer did not notify Claimant that it had changed the classification of his benefits (TR 30).

Subsequent to the change in benefits, Drs. Shapiro and Woodbury considered whether Claimant would benefit from a spinal chord stimulator (CX 1-L, at 25; EX 2, at 16). The unit is implanted on top of the spinal cord and physicians can regulate the frequency and location of its signal to stimulate a population of nerves (EX 2, at 18-19). The signals block pain transmissions going to the brain (EX 2, at 17-18). Dr. Woodbury testified that the spinal chord stimulator was "necessary in order to give [Claimant] the best chance at having relief from his pain" (EX 2, at 53). Dr. Woodbury also testified that Claimant could be a more productive worker if he could have some relief from his pain (EX 2, at 44). Dr. Shapiro agreed that the implant was a possible treatment for Claimant, and that there were few other options (ER 1, at 19-21, 35). However, he stated that he was leaving the decisions regarding the stimulator to other doctors, because it was not his area of expertise (EX 1, at 35). Shortly before the hearing, Claimant underwent a trial implant, which he reported helped his pain considerably and allowed him to walk more normally, placing weight on the bottom of his left foot (TR 21-22, 33).

On October 15, 1998, Employer suspended all benefits to Claimant. In December, 1998, in an informal conference with a Department of Labor Claims Examiner, Employer agreed to pay Claimant an additional 10 weeks of compensation in a lump sum (TR 71). Thus, Claimant effectively received compensation until December 24, 1998.

In January 1999, about a year after Employer changed his benefits classification from temporary total to permanent partial, Claimant underwent another surgery on his right foot to remove a Morton's neuroma (CX 1-J, at 10). Soon after the surgery, Claimant began working for Beasley's Machine Shop earning $300 a week (TR 24).[3] He testified that he was not ready to return to work as soon after the surgery as he did, but that he needed to support his family

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[2] From March 23, 1995 through February 2, 1996, Employer paid Claimant for temporary partial disability because Claimant was working.

[3] Claimant had also worked for Beasley's Machine Shop from March 23, 1995 through February 2, 1996 (TR 24; CX 3).

because Employer had terminated his compensation (TR 37). He worked at Beasley's until April 19, 1999, when he began working for Murray Motorsports (TR 25). At this job, Claimant repairs totaled automobiles. He gets paid $13 an hour, based on a "book rate" that sets a reasonable number of hours to complete a job (TR 25-26). For example, if a job is supposed to take ten hours according to the book and Claimant takes fifteen hours, he only gets paid for ten hours. Conversely, if that job only takes seven hours, he still gets paid for ten hours.

Claimant's current job requires significant manual labor, including occasional stooping, bending, and crawling. There is little heavy lifting, however (TR 58). Claimant's current employer, William Murray, testified that Claimant needs to take frequent breaks and often comes into work late or goes home early (TR 55). He noted that Claimant could get a lot more work done if he did not have to take frequent breaks and go home early (TR 55). He also testified that Claimant often needed assistance with more physically demanding work (TR 60). He stated that he allowed Claimant to work at his own pace because the work was not time-sensitive (TR 55).

Despite his constant pain and his need for frequent breaks, Claimant has earned as much as $859.30 in one week, which equals about 66 hours of book time. Claimant pointed out that this amount reflects book time, not actual time worked. Although his actual pay from week to week varies significantly, Claimant earns an average of $618.40 a week at his new job (CX 5, at 2).

B. Discussion

Claimant asserts that Employer should not have unilaterally changed his benefits classification from temporary total to permanent partial on February 6, 1999, and that his disability has not reached permanency. Claimant points out that he has multiple medical problems stemming from his left foot injury, including depression and injuries to his right foot and back. Claimant asserts that Employer should have sought maximum medical improvement ratings from all of Claimant's treating physicians before changing the classification of his disability. Employer counters that Claimant is only due compensation for the injury to his left foot, and that it has appropriately compensated him for a permanent impairment of 27%.

1. Injures Arising Out of Course of Employment

The first issue to be addressed is whether Claimant is entitled to compensation for the injuries to his right foot and back, and for depression, in addition to compensation for the injury to his left foot. Under Section 20(a) of the Act, if a claimant can establish that an injury occurred and that working conditions existed that could have caused the injury, it is presumed that the injury arose out of and in the course of employment. *See, e.g.*, *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). To rebut the presumption, the employer must produce substantial evidence that "establishes a lack of a causal nexus" between claimant's injury and work conditions. *Dower v. General Dynamics Corp.*, 14 BRBS 324 (1981). The Eleventh Circuit has adopted a "ruling out" standard regarding the rebuttal of the Section 20(a) presumption. *See O'Kelley v. Department of the Army/NAF*, 34 BRBS 39, 41-42 (2000), citing *Brown v. Jacksonville*

Shipyards Inc., 893 F.2d 294, 23 BRBS 22 (CRT) (11th Cir. 1990). Under this standard, the employer has the burden of specifically presenting evidence that rules out "the possibility that there was a causal connection between the accident and . . . disability." *Brown*, 893 F.2d at 297. The unequivocal testimony of a physician, given within a reasonable degree of medical certainty, that the work environment or work-related injury did not cause claimant's present medical condition is sufficient to rebut the presumption. *See O'Kelley*, 34 BRBS at 41-42.

In the present case, Claimant testified that he became depressed from not working, and his psychiatrist's notes focus on his physical limitations and on-going problems with workers' compensation as the source of his depression (TR 21; CX 1-K, at 49). Similarly, Dr. Shapiro stated that Claimant's right foot injuries resulted from him putting a disproportionate amount of weight on that foot because of his left foot pain (EX 1, at 15-17; CX 1-J, at 11), and Dr. Woodbury testified that Claimant's back problems developed from his unnatural posture caused by his foot pain (EX 2, at 9, 50). This evidence satisfies Claimant's burden of showing that an injury occurred and that work conditions could have caused the injury.

Employer has failed to rebut the Section 20(a) presumption. It presented no evidence that Claimant was treated for depression before his injury, or that his depression stems from sources other than the work injury and subsequent chronic pain. While Dr. Shapiro admitted in his deposition that Morton's Neuroma occurs in individuals with no history of injury and that the right foot bone spur could have existed before the left foot injury, his statements by no means rule out the possibility that there is a causal connection between the accident and the disability in the right foot. Rather, his statements merely admit that there is a remote possibility that the right foot injury is not related to the left foot work injury, falling far short of rebutting the presumption. Likewise, Dr. Woodbury testified in his deposition that although Claimant has a disk protrusion, it was his medical opinion that the disk protrusion was not the cause of Claimant's back pain, because the disk protruded on the opposite side from Claimant's primary symptoms, and because Claimant received "17 blocks in the past and didn't get any relief" (EX 2, at 9-10). Therefore, Employer has failed to rebut the presumption that Claimant's right foot injury, back injury, and depression are causally related to his work injury.

2. Nature and Extent of Disability

Since it has been determined that all of claimant's injuries arose out of and in the course of employment, the next step is to determine the nature and extent of his disability due to those injuries.

In *Frye v. Potomac Electric Power Co.*, 21 BRBS 194 (1988), in which the claimant received a scheduled injury to his ankle which caused him to develop chronic pain syndrome and a back injury, the Board held that,

> where harm to a part of the body not covered under the schedule results from the natural progression of an injury to a scheduled member, claimant may also receive a Section 8(c)(21) award. However, he is

> limited to *one award for the combined effect of his conditions, as he sustained only one compensable injury* which has affected other parts of the body . . . . Therefore, on remand, the administrative law judge must determine whether claimant's back condition and chronic pain syndrome are the sequelae of his ankle injury, in which case he is entitled to a Section 8(c)(21) award *for all conditions* . . . .

Id. at 198 (emphasis added). Since claimant's right foot, back and psychological conditions are sequelae of the injury to his left foot, and his back and psychological injuries are unscheduled injuries, all of claimant's conditions have to be considered together under Section 8(c)(21) if and when claimant's disability becomes permanent.

Employer, relying on *Potomac Electric Power Company v. Director, OWCP*, 449 U.S. 268 (1980), asserts that an employee with a scheduled injury cannot receive compensation for a non-scheduled disability under Section 8(c)(21) for loss of wage earning capacity (Employer's post-hearing brief at 6). Employer's reliance on this case is misplaced. *PEPCO* involved a claimant whose only injury was to his foot but sought compensation based on his loss of wage-earning capacity rather than accepting compensation based on the schedule. *See PEPCO*, 449 U.S. at 272. The Supreme Court held that the Act does not "authorize an alternative method for computation of disability benefits in certain cases of permanent partial disability already provided for in the statute." *Id.* at 274. However, this holding was limited to situations in which the claimant has only one injury, and that injury was a scheduled injury under §8(c). In the present case, Claimant has multiple injuries, both scheduled and unscheduled, stemming from one initial injury suffered in a work-related accident. In such cases, the Board has held that *PEPCO* is inapplicable, and that compensation based on a loss of wage-earning capacity under Section 8(c)(21) is appropriate. *See Frye, supra*. Accordingly, *PEPCO* does not preclude an award of benefits under Section 8(c)(21) in this case if claimant is entitled to compensation for permanent disability.

In light of *Frye*, since a claimant's work-related injury and any other conditions which are sequelae of the same injury must be considered together in determining the claimant's compensation for permanent disability, it stands to reason that claimant's left foot injury and the other conditions that are sequelae of that injury must be considered together in determining whether claimant has reached maximum medical improvement and thus become entitled to compensation for permanent disability.

The parties have stipulated that the claimant's disability was temporary until Dr. Shapiro stated that his left foot had reached maximum medical improvement on January 28, 1998. Claimant contends that his disability has not yet become permanent, whereas the employer contends that he reached permanence on the date of Dr. Shapiro's impairment rating.

An injured worker's impairment may be found to have changed from temporary to permanent either when the employee's condition reaches the point of maximum medical

improvement, *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1985), or when a Claimant's "condition has continued for a lengthy period, and it appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period." *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968). An important consideration is when a Claimant stops receiving treatment with a view toward improving his condition. *See Leech v. Service Engineering Company*, 15 BRBS 18 (1982).

Claimant was originally injured on the job seven years before the hearing. He has been in treatment for depression since 1994 (CX 1-D, at 24-28), has had pain in his right foot since at least 1994 (CX 1-D, at 33), and has been treated for back pain since 1997 (CX 1-L, at 33). There is ample testimony that Claimant has few treatment options yet available to him. Claimant had surgery on both his feet in 1997. Dr. Woodbury maintained that physical therapy would be "money wasted" and stated repeatedly in his notes since July 23, 1998 that "there is little else I have to offer this gentleman" (EX 2, at 45; CX 1-L, at 3, 15, 17). Claimant does not attend regular therapy sessions with Dr. Tillinger, but only calls him to talk on the phone occasionally "if I need to," which indicates that his psychological condition is not improving, but is in a maintenance state (TR 21). Further, it appears that Dr. Shapiro's impairment rating in January, 1998 reflected his belief that claimant had fully recovered from the June, 1997 surgery to his left foot. He testified that the only treatment available for Claimant was to "continue to treat whatever soft tissue problems arise, treat with orthodics, and consider . . . the implantable electrode" (EX 1, at 35). He further stated that RSD "is a very difficult condition to treat and it doesn't seem to have a cure" (EX 1, at 27). This evidence suggests that Claimant is suffering from a longstanding disability that may never be optimal and may never be entirely static.

Still, on the same date Dr. Shapiro found that claimant had reached maximum medical improvement and gave claimant an impairment rating, he noted that claimant had increasing pain (CX 1-J, at 21), and within a few months he referred claimant to Dr. Woodbury for pain management (*id*. at 18), both of which are inconsistent with a determination that claimant's condition had stabilized. Moreover, claimant had further surgery on his right foot on January 14, 1999 (*id*. at 10). On December 17, 1998, Dr. Shapiro stated that "claimant has been disabled from work since January of 1998 and will remain disabled following his upcoming surgery on January 14, 1999 until at least August 14, 1999 . . . ." (CX 1-J, at 11) This also is inconsistent with a determination that the claimant had reached maximum medical improvement in January, 1998. Further, at the time of the hearing, at least one treatment was anticipated that could significantly improve Claimant's RSD and thus his overall physical condition. Claimant was scheduled to have a spinal chord stimulator implanted soon after the hearing. Dr. Woodbury had recommended this procedure five months after he began treating the claimant, in May, 1998 (CX 1-L, at 21), but testified that he had to put it off because the workers' compensation carrier would not approve it (EX 1, at 46-47). Drs. Shapiro and Woodbury testified consistently with one another that this procedure could significantly reduce Claimant's pain. Dr. Shapiro stated that the electrode could "reduce pain," (EX 1, at 21), and that "the goal of the stimulator and the reason to use it is to try to get patients to be more functional and in some cases to get them off narcotic pain medication" (EX 1, at 26). Dr. Woodbury explained that he had considered the spinal chord stimulator to

treat Claimant's RSD because it could block pain transmission to the brain (EX 2, at 17-18). Of the five patients he had implanted to treat RSD, he estimated that four patients experienced 60-70% pain relief, and one patient had a 30-40% improvement (EX 2, at 35). Three of the patients were off all medication, and two had reduced their medications significantly (EX 2, at 35). Further, Dr. Woodbury asserted that he would recommend the spinal chord stimulator even though Claimant has shown an ability to work through his pain in the past, stating that, although Claimant had been working full time, he was not "the most productive employee on the line . . . he has a capacity of being greater or producing more than he's doing right now" (EX 2, at 42-43). In addition, Claimant himself testified that his pain was significantly reduced when he had a trial stimulator implanted (TR 21).

Based on the medical evidence and Claimant's own testimony, it appears that the stimulator could improve Claimant's physical condition by significantly reducing his pain. Where treatment to improve a claimant's condition is anticipated, his condition has not reached permanency. *See Leech*, 15 BRBS at 18 (1982). It is true that, according to the medical testimony, Claimant has few options left to improve his condition, and he appears to be approaching a time when treatment will be focused on maintenance of his medical conditions, at which point his disability will become permanent. However, until he has undergone a procedure that could significantly reduce his pain and increase his functionality, his disability remains temporary.

Once the nature of Claimant's disability is determined, the extent of his disability must be established. To establish a prima facie case of total disability, Claimant must show that he cannot return to his regular and usual employment due to his work-related injury. *See Trans-State Dredging v. Benefit Review Board*, 731 F.2d 199, 16 BRBS 74 (CRT) (4th Cir. 1984). A claimant's usual employment is the claimant's job at the time he was injured. Neither party disputes that Claimant is unable to return to his job with Employer. Once the claimant establishes a prima facie case of total disability, the burden shifts to the employer to establish suitable alternative employment. An employer must demonstrate the existence of realistically available job opportunities for the claimant within the area where he resides which he is capable of performing considering his age, education, work experience, and physical restrictions. *See American Stevedores, Inc. v. Salzano*, 538 F.2d 933, 4 BRBS 195 (2d Cir. 1976). In this case, Claimant asserts that he was totally disabled until January 20, 1999, when he began working at Beasley's Machine Shop, at which point he became partially disabled. Employer presents no evidence of suitable alternative employment before Claimant started working in January 1999, but simply asserts that it was correct to convert Claimant's benefits from total disability to partial disability after Dr. Shapiro assigned Claimant an MMI rating of 27% to his left foot in early 1998.

Employer was incorrect in converting Claimant's benefits from total to partial disability in February 1998 based on the MMI rating for his left foot injury. The Board rejected this approach in *Rinalidi v. General Dynamics Corp.*, 25 BRBS 128 (1991), where it held that "an injured employee's total disability becomes partial on the earliest date that employer shows suitable alternate employment available," not when a Claimant reaches maximum medical improvement,

because such an approach would ignore the economic aspects of disability. Employer asserts in its post-hearing brief, and Claimant does not contest, that Claimant's present work is suitable alternate employment.[4] *See* Employer's post-hearing brief, at 8-9. In the absence of any evidence that Claimant could have worked before he became employed at Beasley's Machine Shop, I find that Claimant's disability became partial on January 20, 1999, the date he began working at Beasley's.

2. Compensation from January 20, 1999 through the present

Having determined that Claimant's disability remains temporary and became partial on January 20, 1999, the amount of Claimant's compensation must be set. Claimant requests compensation for temporary partial disability from January 20, 1999 through April 18, 1999 based on average wages of $300 a week at Beasley's Machine Shop, and for April 19, 1999 through January 23, 2000 based on an average wages of $555.90 a week at Murray Motorsports.

Claimant began working at Beasley's Machine Shop on January 20, 1999. The parties stipulated that his average wages there were $300 a week. On April 19, 1999, he began working for Murray's Motorsports. Claimant received payments of $20,407.20 for 33 weeks of work at Murray Motorsports (CX 5, at 2). Although his actual earnings from week to week varied

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[4] It is noted that there is substantial evidence in the record that Claimant may actually be pushing himself beyond his physical ability in his work rebuilding cars at Murray Motorworks. Dr. Shapiro explicitly stated that Claimant "is not really capable on any sustained basis of working at a job that requires him to be on his feet, you know, for excessive periods of time" and "he can have a more sedentary job" (EX 1, at 34-35). Dr. Hinnant, a psychologist, specifically cautioned that Claimant "has a tendency to work beyond his capacity, leading to increased pain" and that after the dorsal column stimulator was in place, "our greatest concern will probably be helping him learn how to pace himself and not overdo his physical activities" (CX 1-L, at 13-14). Further, Dr. Woodbury repeatedly stated that "Mr. Johns is one of the most straight forward and motivated individuals I have ever encountered with this particular disorder" (CX 1-L, at 1; EX 2, at 48). Claimant's wife characterized him as a "workaholic" before his injury, but testified that he now lives with constant pain which often affects his ability to work at his present job (TR 61-63). Claimant himself testified that he engaged in significant physical activity at his job, and that he did so because "I do have to. I got to live" (TR 45). Claimant's current employer testified that he fully accommodates Claimant's need for frequent breaks and need to come in late or go home early because of his pain (TR 55-56). This evidence indicates that Claimant may be working beyond his physical capabilities, and that he would be unable to maintain his job if his employer were not exceptionally accommodating. Nevertheless, since the Claimant has not contested that his work for Murray Motorworks is suitable alternate employment, I accept it as such.

significantly, this calculates to an average of $618.40 a week. Absent any other evidence in the record in regard to claimant's wage-earning capacity during these periods, I find that his earnings at Beasley and Murray Motorsports represent Claimant's wage-earning capacity for the applicable periods.

However, Claimant's wage earning capacity must be calculated to reflect his wage earning capacity at the time of his injury. *See Bethard v. Sun Shipbuilding and Dry Dock Co.*, 12 BRBS 691 (1980). Claimant was injured in October 1992. In that month, the National Average Weekly Wage was $360.57. In both January and April, 1999 the National Average Weekly Wage was $435.88. The difference in the National Average Weekly Wage average weekly wage between October 1992 and either January or April, 1999 is 17.3%. Subtracting 17.3% from Claimant's weekly wages of $300 from January 20, 1999 through April 18, 1999 equals $248.10; subtracting 17.3% from Claimant's weekly wages of $618.40 from April 1999 on equals $511.42. When these figures are compared to Claimant's average weekly wage at the time of the injury of $800.00, Claimant sustained a loss of wage-earning capacity of $551.90 from January 20 through April 19, 1999 and $288.58 thereafter.

Finally, based on the parties' stipulation, I find that the Claimant was temporarily totally disabled from February 15, 2000, when he was scheduled to undergo implant surgery, until he is released to return to work by his physicians.

3. Compensation for Missed Payments From 1993-1996

In his post-hearing brief, Claimant lists several payments that Employer failed to make during periods of stipulated disability. The missed payments, which are substantiated by the records of Employer's payments to the Claimant (JX 2) are as follows: missed payment for temporary total disability, July 24, 1993 through August 3, 1993 (JX 2, at 58); missed payment for temporary total disability, February 2, 1995 through March 22, 1995 (JX 2, at 48); and a missed payment for one day during the period October 24-October 31, 1996 (JX 2, at 37).[5] Claimant is owed compensation for these periods of missed payments, plus applicable interest and penalties.

In addition, Claimant requests temporary partial disability benefits from March 23, 1995 through January 31, 1996. The parties have stipulated that Claimant was temporarily partially disabled from March 23, 1995 through February 2, 1996, during which time he worked at Beasley's Machine Shop earning $250 a week (JX 1). However, Employer failed to pay any compensation to the claimant for the period from March 23 through November 14, 1995. Rather, Employer made payments to Claimant for temporary total disability starting on November 15, 1995 and extending well past January 31, 1996 (JX 2, at 47-48). Therefore, Claimant is entitled

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[5]Employer paid Claimant one week's compensation – $533.36 – for the period October 16-October 24, 1996. But since this is a period of eight days, not seven, Claimant is owed compensation for one additional day.

to compensation for temporary partial disability from March 23, 1995 through November 14, 1995 based on his loss of wage-earning capacity during that period. Since Claimant was earning $250 a week, that will be considered his wage-earning capacity for that period.

However, as was discussed above, Claimant's wage earning capacity must be calculated to reflect his wage earning capacity at the time of his injury. The National Average Weekly Wage in October, 1992, the month in which Claimant was injured, was $360.57. In March, 1995, when Claimant first went to work for Beasley, the National Average Weekly Wage was $380.46. The difference in the National Average Weekly Wage between October 1992 and March 1995 is 5.2%. Subtracting 5.2% from $250.00 equals $237.00. When this figures is compared to Claimant's average weekly wage at the time of the injury of $800.00, Claimant sustained a loss of wage-earning capacity of $563.00 between March 23, 1995 and January 31, 1996.

4. Attorney's Fee

Claimant's counsel has filed a petition as an attachment to her post-hearing brief requesting an attorney's fee totaling $24,783.53 for her representation of the Claimant before this Office. The fee is based on 155.7 hours billed at $150.00 an hour, and includes $1,428.53 as reimbursement of expenses. Employer has not yet filed a response to the fee petition. Employer is given 15 days after its receipt of this decision to file any objections to the fee petition.

ORDER

IT IS ORDERED that:

1. Employer shall pay to the claimant:

a. Compensation for temporary total disability from July 24, 1993 through August 3, 1993, February 2, 1995 through March 22, 1995, and October 31, 1996 based on an average weekly wage of $800.00;

b. Compensation for temporary partial disability from March 23, 1995 through January 31, 1996 based on a loss of wage-earning capacity of $563.00;

c. Compensation for temporary total disability from January 28, 1998 through January 20, 1999, based on an average weekly wage of $800.00;

d. Compensation for temporary partial disability from January 21, 1999 through April 18, 1999 based on a loss of wage-earning capacity of $551.90 a week;

e. Compensation for temporary partial disability from April 19, 1999 through February 14, 2000 based on a loss of wage-earning capacity of $288.58 a week;

f. Compensation for temporary total disability from February 15, 2000 and continuing until Claimant is released to return to work by his physicians, based on an average weekly wage of $800.00; and

g. Medical benefits for the October 26, 1992 injury to Claimant's left foot, the resulting injuries to Claimant's right leg and back, and the depression arising from these injuries.

2. Employer shall receive credit for all previous payments of compensation and medical benefits under both the Act and State law.

3. Employer shall also pay interest on all unpaid compensation from the date due until paid in accordance with 28 U.S.C. §1961(a), and applicable penalties.

4. Employer shall file any objections to Claimant's counsel's fee petition within 15 days of its receipt of this decision.

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JEFFREY TURECK
Administrative Law Judge